Supreme Court, U.S.
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In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition for Writ Of Certiorari To
The U.S. Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

DUANE J. DESIDERIO
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15th Street, NW
Washington, D.C. 20005
(202) 266-8146

MICHAEL M. BERGER
Counsel of Record
GIDEON KANNER
BERGER & NORTON
12121 Wilshire Blvd
Los Angeles, CA 90025
(310) 979-2500

GEORGE O. LUDCKE
KELLY & BERENS, P.A.
80 SOUTH 8TH STREET
MINNEAPOLIS, MN 55402
(612) 349-6171

Attorneys for Petitioner

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QUESTIONS PRESENTED

1. Should this Court resolve the conflict between its decisions in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997)? The former *requires* landowners seeking compensation for regulatory taking of property to sue in the state courts and *prohibits* them from suing in U.S. District Court. However, the latter simultaneously *grants* municipal defendants in such cases the *absolute right to remove* them to U.S. District Courts — even though (a) removal is authorized by 28 U.S.C. § 1441(a) only if the plaintiff could have filed suit in federal court in the first instance which, under *Williamson County*, landowners may not; and even though (b) the combination of *Williamson County* and *City of Chicago* gives municipal defendants a veto power over the plaintiff's 7th Amendment right to a jury trial under *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

   The Court of Appeals agreed with Petitioner that this situation represents an "anomalous . . . gap in Supreme Court jurisprudence," but declined to address it, explicitly concluding that how to resolve the conflict "is for the Supreme Court to say, not us."

2. When a city openly defies this Court's holding in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by (1) imposing onerous conditions on a land use approval that are grossly disproportional to the burdens the proposed project will create, and (2) flatly refusing its duty to show any proportionality, has the landowner stated a claim on which relief can be granted by a U.S. District Court?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Franklin P. Kottschade respectfully prays that a Writ of Certiorari issue to review a final judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision was filed on February 13, 2003, and is reported as *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003). (App., p. 1.) A timely Petition for Rehearing and Rehearing En Banc was denied in an unreported order filed March 21, 2003. (App., p. 8.) The District Court's opinion (App., p. 9) is unreported.

JURISDICTION

This case was filed because the City of Rochester defied this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). There, this Court held that a municipality could constitutionally condition the issuance of a land development permit only if its conditions were roughly proportional to burdens the proposed development would place on the community, and if the municipality satisfied demonstrated that proportionality. Here, Rochester imposed conditions that were grossly disproportionate, and repeatedly refused Mr. Kottschade's requests to explain how the conditions related to his development.

Mr. Kottschade sued in U.S. District Court for these 5th Amendment violations. That court dismissed, believing *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) required Mr. Kottschade to sue in state court first. Mr. Kottschade relied on *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). There, this Court held that a city sued in state court had the

right to remove the case to federal court under 28 U.S.C. § 1441(a) because the plaintiff could have filed suit in federal court in the first instance. Mr. Kottschade therefore urged that *City of Chicago* modified *Williamson County*, for if a defendant can remove, then *perforce* the plaintiff must be able to file in federal court initially.

The District Court concluded that, *City of Chicago* notwithstanding, *Williamson County* controlled and dismissed the case. (App., p. 16-.) The 8th Circuit affirmed. Although it agreed with Mr. Kottschade that the situation was "anomalous" (App., p. 5), that Court refused to address the anomaly, concluding that how to resolve it "is for the Supreme Court to say, not us" (App., p. 5).

This Court's jurisdiction is by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1441(a):

"Except as otherwise expressly provided by Act of

Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

STATEMENT OF THE CASE

Frank Kottschade, a long-time resident of, and developer in, the City of Rochester, Minnesota, sued under 42 U.S.C. § 1983 charging a regulatory taking of property.

Mr. Kottschade sought to develop a townhouse project on a 16.4-acre parcel of land he acquired in 1992. After years of attempting to satisfy various city concerns (through four different development proposals), the city purported to grant a permit in June, 2000. However, it attached conditions to the permit that reduced the number of homes from 104 to 26, and added nearly $70,000 in development costs *to each unit* — in a market where such homes sell for $125,000. Economically, it was an impossibility. Constitutionally, it was a taking.

Knowing that this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) allowed conditions only if they bore a rough proportionality to the burdens the proposed development would place on the community (and knowing that these conditions bore no relationship to his project whatever), Mr. Kottschade asked the city to explain the nexus and its proportionality. Even though *Dolan* placed the burden on the city to provide such an explanation, the city flatly refused. Twice. In writing.

Mr. Kottschade then filed this suit. The District Court dismissed (App., p. 17) and the 8th Circuit Court of Appeals, albeit with some expressly voiced discomfort (App., p. 5), affirmed (App. p. 7). Thus, this Petition.

REASONS FOR GRANTING THE WRIT

I. THE CONUNDRUM TO BE RESOLVED

A. Do State Or Federal Courts Have Initial (Or Sole) Jurisdiction Over Regulatory Taking Claims Under The 5th Amendment? And Who Decides?

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), this Court held that a municipal defendant in a state court action challenging the validity of land use regulations (under both state and federal law)[1] may remove that case to federal court. The rationale was that the plaintiff could have filed suit in federal court in the first instance (as the suit raised federal questions) and therefore 28 U.S.C. § 1441(a) granted the defendant the reciprocal right to remove the case. (522 U.S. at 164.) However, in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that such plaintiffs may *not* file such actions in federal court, but must first repair to the state courts and seek compensation there, before their claims can be deemed ripe for federal court litigation. (473 U.S. at 200.)

In fairness to this Court, it appears that the briefs in *City of Chicago* did not call *Williamson County* to the Court's attention. The adversary system failed to disclose the doctrinal cliff toward which the Court was being urged.

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[1] The plaintiff in *City of Chicago* raised federal due process, equal protection and taking claims, as the trial court noted (1997 WL 171350) and this Court confirmed (522 U.S. at 160). It is the allegations in the complaint that determine federal jurisdiction. (E.g., *Bell v. Hood*, 327 U.S. 678, 681 [1946].)

That is likely why neither the majority nor the dissent in *City of Chicago* mentions *Williamson County*. As a consequence, the constitutional law of regulatory takings now contains two contradictory jurisdictional holdings.

B. Confusion And Unfairness Of "Catch-22" Proportions Abound In The Wake Of Two Conflicting Decisions From This Court.

The interaction between these two holdings has given rise to a true "Catch-22" conundrum. No matter which court property owners choose to file suit, their municipal adversaries can muster decisional law saying that they should be in the other court system.

Under *Williamson County*, landowners are said to be barred from federal court while *simultaneously* — under *City of Chicago* — defendants *in the same cases* can force them into federal court on the bizarre theory that the plaintiffs could have sued there in the first place, although — under *Williamson County* — they could not. Adding insult to injury, some federal courts have dismissed such removed cases on the stunning ground that the plaintiffs (who were brought to federal court involuntarily by the defendants) should have pursued their action in state court.[2]

The upshot is that either *City of Chicago* modified

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[2] E.g., *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003); *Reahard v. Lee County*, 30 F.3d 1412, 1414, 1418 (11th Cir. 1994) (after two federal trials and two appeals). See *Anderson v. Charter Township. of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001) (landowner sued in state court, municipality removed to federal court, district court abstained and remanded state claims to state court; when property owner returned to district court to litigate federal claims, district court dismissed the case under the *Rooker-Feldman* doctrine).

Williamson County or the Court has inadvertently created not only an insoluble anomaly in the law, but also a class of American litigants who are *de facto* pariahs — second class citizens whose sole access to federal court rests on the whim of the defendant, and who are at times subjected to a judicial "ping-pong game" whereby they file suit in state court, only to have it removed to federal court, which then remands it back to state court. (E.g., *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173 [D. Kans. 1999]; *Vigilante v. Village of Wilmette*, 88 F. Supp. 2d 888 [N.D. Ill. 2000].)

Mr. Kottschade submits that this Court could not have intended to bring about such a grotesque procedural regime, and urges that the prevailing "ripeness mess"[3] cries out for a second look by this Court to reconcile *Williamson County* with *City of Chicago*, and inform aggrieved property owners whether they can *ever* have their federal constitutional cases heard on the merits in federal court.

C. The Unfairness And Confusion Created By This Jurisdictional Conflict Are Widely Recognized.

Courts and commentators expressed confusion and unhappiness with the jurisdictional problems created when *Williamson County* held that property owners could try their regulatory taking cases in federal court, but only after first "ripening" them in state court. (See *post*, pp. 23-26.)

City of Chicago exacerbated the situation. Lawyers from the ABA's State and Local Government Law Section, representing diverse clients, concluded after a weekend

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[3] See John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse,* 31 Urb. Law. 195, 196, fn. 5 (1999).

retreat devoted to this and related issues that either both parties or neither ought to have access to the federal courts:

> "The second and third recommendations deal with the apparent anomaly in effect, though probably not in intent, when *Williamson* is juxtaposed against *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). Under *City of Chicago*, governmental defendants can, and frequently do, remove takings claims initiated in state court to federal court under the federal removal statute. At the same time, under *Williamson*, plaintiffs who bring those very same claims in federal court are told they must litigate in state court. As a result, the defendants in takings claims have a choice of forum — state or federal — while takings plaintiffs under *Williamson* are apparently required to go only to state court." (*Report of Retreat on Takings Jurisprudence*, in *Taking Sides on Takings Issues* 568, 574 [ABA 2002; Thomas E. Roberts, ed.].)

The ABA retreat thereby ended by asking for judicial help in resolving the dissonance between *Williamson* and *City of Chicago*. Mr. Kottschade asks this Court to take this opportunity to correct the anomalous state of regulatory takings jurisdictional jurisprudence.

II. THERE IS DIRECT CONFLICT BETWEEN TWO DECISIONS OF THIS COURT: *WILLIAMSON COUNTY* PRECLUDES PROPERTY OWNERS FROM SUING IN FEDERAL COURT FOR 5TH AMENDMENT REDRESS, WHILE *CITY OF CHICAGO* WELCOMES MUNICIPAL DEFENDANTS TO REMOVE THE SAME CASES TO FEDERAL COURT. THEY CANNOT OPERATE HARMONIOUSLY.

Simply put, *Williamson County* and *City of Chicago*

are — as applied below — in direct conflict. *City of Chicago* is based on the even-handed rule of 28 U.S.C. § 1441(a), i.e., if the plaintiff could have filed suit in federal court but chose the state venue instead, then the defendant has the absolute right to remove the case to federal court. Thus, if *City of Chicago* is to be viewed as rational, Mr. Kottschade should have been permitted to file suit directly in federal court. The courts below, however, refused to apply *City of Chicago* because, in their view, until this Court itself reconciles it with *Williamson County*, then *Williamson County* mandates dismissal regardless of what *City of Chicago* may have said later. Under the lower courts' reading of this Court's decisions, only one of the parties to litigation like this has free access to federal court, while the other has none. [4] As summarized in a leading treatise:

> "While not put so starkly, the message for property owners seems to be: 'You can't be heard in federal court, but your opponents can.' " (Steven J. Eagle, Regulatory Takings 1091 [2d ed. 2001].)

That cannot be the law.

28 U.S.C. § 1441(a) restricts removal to:

> ". . . any civil action brought in a State court *of which the district courts of the United States have original jurisdiction*." (Emphasis added.)

Thus, unless the International College of Surgeons

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[4] That the *City of Chicago* complaint also contained due process and equal protection claims is of no moment. As Professor Kovacs has explained, the same Williamson County ripeness rule has been applied to those claims. (Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 Ecology L.Q. 1, 19 [1999] [collecting exemplars of each].)

could have brought its regulatory taking case in U.S. District Court initially, based on that court's original jurisdiction, the City of Chicago *could not* have been permitted to remove the case to federal court. But had the International College of Surgeons filed initially in federal court, it would have received the same response as Mr. Kottschade: case dismissed. That has been the consistent lower court treatment since *Williamson County*. (See Delaney & Desiderio, *supra*, 31 Urb. Law. at 206-231 [collecting and analyzing in tabular form all federal land use cases decided between 1990 and 1998].)

In ruling that removal was proper, this Court concluded simply that, "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (*City of Chicago*, 522 U.S. at 528-529.) The Court was well aware of the momentous nature of its decision. Any doubt was dispelled by Justice Ginsburg's dissent, characterizing the decision as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180), because:

> "After today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (522 U.S. at 175; Ginsburg, J., dissenting.)

Here, the Courts below concluded that, until this Court expressly says otherwise, they would have to apply *Williamson County* and dismiss this case because it had not gone through state court on the way to federal court. (App., pp. 5, 16.) As the Court of Appeals put it, the result of this "perceived gap in Supreme Court jurisprudence" is "anomalous" (App., p. 5), but whether *City of Chicago* authorizes any relief from this anomaly "is for the Supreme Court to say, not us" (App., p. 5).

It cannot be the rule that property owning plaintiffs are barred from federal court while municipal defendants in the same cases have a free pass into federal court whenever they like. The issue goes to jurisdiction. Property owners are said to be unable to file in federal court because the federal courts lack jurisdiction. (E.g., *Reahard*, 30 F.3d at 1415.) But jurisdiction cannot magically appear out of thin air merely because some municipal defendant wants it. Jurisdiction exists, or it does not. Yet *City of Chicago* and *Williamson County* now simultaneously answer the same jurisdictional question "yes" and "no." The decisions below make plain that lower courts will not address this "mess" without guidance. Clarification by this Court is necessary.

III. EVEN BEFORE THIS COURT ISSUED ITS SECOND — CONFLICTING — OPINION, LOWER COURTS HAD MADE A HASH OF A RULE THIS COURT DESIGNED AS "*NOT YET RIPE* FOR FEDERAL COURT," TURNING IT INTO A RULE OF "*NOT EVER* IN FEDERAL COURT."

A. The Premise Of *Williamson County* Was That Property Owners Would Be Able To Obtain A Federal Court Ruling On The Merits Of Their Regulatory Taking Claims After They First "Ripened" Their Cases In State Court.

Even commentators opposed to landowners concede (as they must) that the plain language of *Williamson County* contains a clear promise of federal court access:

> "Reliance [by the Court] on the ripeness rationale, unfortunately, suggests to property owners that their complaints will be ripe and heard in the federal courts after their state suits are over." (Thomas Roberts, *Fifth*

Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata, 24 Urb. Law. 479, 480 [1992].)

Williamson County made clear that this Court was (a) deciding whether a claim was YET ripe for litigation in federal court and (b) that there were things which FIRST had to be done in state court AFTER WHICH the federal constitutional claims WOULD BE RIPE for federal court.

The Court's analytical discussion begins by saying that ". . . respondent's claim is *premature*." (473 U.S. at 185; emphasis added.)[5] Prematurity necessarily means that something is yet to be done to make the matter mature, or jurisprudentially "ripe." *Williamson County* then says that, because of the lack of both a final administrative decision (not in issue here[6]) and the absence of an attempt to seek compensation in state court, ". . . respondent's claim is *not*

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[5] The Court did *not* say there was no valid claim. Nor could it. Federal courts at that time had dealt with such claims — as they routinely deal with other Bill of Rights claims — for years. See, e.g., *Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985); *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 99th Cir. 1983); *Barbian v. Panagis*, 694 F.2d 476 (7th Cir. 1982); *Fountain v. Metro Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982); *Hernandez v. Lafayette*, 643 F.2d 1188 (5th Cir. 1981); *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978).

[6] Here, the city granted Mr. Kottschade a permit, albeit subject to financially ruinous conditions, and refused any variances. Thus, in *Williamson County's* words, we know precisely "how [he] will be allowed to develop [his] property." (473 U.S. at 190.) As the court below pointed out, Mr. Kottschade — in contrast to *Williamson County* — had exhausted his administrative remedies (App., p. 5) and thus had obtained a final determination of what the city would approve.

ripe." (473 U.S. at 186; emphasis added.) Absence of ripeness necessarily means that the matter can be ripened.

Throughout the opinion, the Court returns to these twin concepts, emphasizing and reemphasizing the temporal nature of its holding, repeatedly saying that such cases *can* be ripened and *then* litigated in federal court. The Court's language demonstrates that the Court plainly was *delaying* a property owner's entry into the federal courthouse, not barring it. That concept of a dilatory plea is crucial in analyzing the development of the law since then.

> "A second reason the taking claim is *not yet ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so." (473 U.S. at 194; emphasis added.)
>
> "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." (473 U.S. at 195; emphasis added.)
>
> ". . . *until* [plaintiff] has utilized that procedure, its taking claim is *premature*." (473 U.S. at 197; emphasis added.)

The opinion ends as it began, with this conclusion:

> "In sum, respondent's claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." (473 U.S. at 200; emphasis added.)

Thus, *Williamson County* is founded on the twin concepts of "not yet" and "not until." But lower courts have lost track of that. Instead, property owners who satisfy *Williamson County* find, when attempting to file their now-ripened federal suits, that the door is barred by *res judicata*

and collateral estoppel. (See *post*, p. 17.)[7] Thus, the upshot is that this Court's endorsement of property owners' right to litigate in federal court after ripening their suits in state court has been overruled by lower courts. Instead, takings plaintiffs have been banished to state courts.

If that had been this Court's intent, *Williamson County* could have said so. Directly. Its holding could have been simple and straightforward: "All takings litigation must be brought in state courts; federal courts have no jurisdiction to entertain it, even though it involves the application of the federal Constitution." Period. Plainly, neither the Congress that enacted 42 U.S.C. § 1983 nor the Court that wrote *Williamson County* had that in mind. Quite the contrary. All commentators agree that the Court's words plainly tell property owners that the way to litigate their 5th Amendment cases in federal court is to "ripen" them by litigating first in state court.[8]

Williamson County's evident establishment of a system by which property owners could eventually litigate federal issues in federal court was in keeping with a long line of decisions holding that those who plead federal

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[7] As the 8th Circuit put it below, Mr. Kottschade was "justly" concerned about this likelihood. (App., p. 6; 319 F.3d at 1041.)

[8] E.g., Steven J. Eagle, *Regulatory Takings* 1063 (2d ed. 2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation,* 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language . . . suggests that the state law suit is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap,* 32 Urb. Law. 239 (2000) ("language . . . suggested that, eventually, a litigant's taking claim would be heard in federal court"); *Id.* at 249 ("language of Williamson suggests that a federal claim will survive after disposition in the state court").

claims and seek the aid of federal courts have a right to a federal determination. (E.g., *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 [1909]; *Bell v. Hood*, 327 U.S. 678, 681 [1946]; *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 [1964].) As this Court put it, there are "fundamental objections" to compelling a plaintiff who has legitimately invoked federal jurisdiction "without his consent and with no fault of his own, to accept instead a state court's determination of those claims." (*England*, 375 U.S. at 415.) It is no different here.

B. Lower Courts Have Misused *Williamson County* As A Device To Prevent Property Owners —Alone Among Citizens — From Litigating *Federal* Constitutional Issues In *Federal* Court.

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . . ." (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].

Notwithstanding this Court's clear language, property owners have been *de facto* singled out for virtual exclusion from the federal court system for redress of their 5th Amendment grievances against local government agencies. As things stand now American land owners like Mr. Kottschade — unlike any other citizens — may *never* obtain federal adjudication of their federal rights.

1. Property owners are the only victims of Bill of Rights violations who are barred from seeking redress in federal court.

That property owners have been singled out is clear. (See, e.g., Eagle, *supra* at 1068-1070; Timothy J. Kassouni,

The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights, 29 Cal. West. L. Rev. 1, 2 [1992]; Robert H. Freilich, Adrienne H. Wyker & Leslie Eriksen Harris, *Federalism at the Millennium: A Review of U.S. Supreme Court Cases Affecting State and Local Government*, 31 Urb. Law. 683, 685 [1999].) As one commentator concluded, "[t]he state compensation portion of [*Williamson*] finds no parallel in the ripeness cases from other areas of the law." (Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 23 [1995].)

Paradoxically, federal court protection is routinely provided in *some* land use cases — but only those involving aspects of the Bill of Rights *other than* the Fifth Amendment. Federal court First Amendment cases abound, for example, in which the validity of local land use ordinances regulating, or zoning for, sexually explicit work has been challenged.[9] There is no requirement of first presenting the issues to state courts, even though they implicate the same zoning policies and land use ordinances as do other land use cases. First Amendment cases dealing with the land use aspects of establishment of religion are also litigated in federal courts in the first instance[10]

Moreover, at the behest of aggrieved citizens, federal courts have involved themselves in the local intricacies of city budget policy,[11] county law enforcement

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[9] E.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

[10] E.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994).

[11] *Berkley v. Common Council*, 63 F.3d 295 (4th Cir. 1995) (*en banc*).

policy,[12] municipal policy governing the use of force during arrests,[13] county road acquisition policy,[14] municipal employment policy,[15] city medical care policy,[16] school district sexual abuse policy,[17] police department sexual harassment policy,[18] and even the question whether "extortion of outsiders, businessmen, or developers" was town policy.[19] As this Court once noted, federal courts routinely review issues involving exercise of a state's sovereign prerogative, including the power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue bonds without a referendum, and a host of others. (*County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 191-192 [1959] [collecting cases] [retaining federal court jurisdiction over a state eminent domain case].)

The cited cases deal with parallel features of the Bill of Rights, routinely protected in federal court through 42 U.S.C. § 1983 — even against unconstitutional land use regulations. All sorts of local governmental issues are litigated in federal courts every day. And they involve all

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12 *Turner v. Upton County*, 915 F.2d 133 (5th Cir. 1990).

13 *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996), *cert. denied* 117 S.Ct. 1086 (1997).

14 *Hammond v. County of Madera*, 859 F.2d 797 (9th Cir. 1988).

15 *Richardson v. Leeds Police Dept.*, 71 F.3d 801 (11th Cir. 1995).

16 *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991).

17 *Gonzalez v. Ysleta Indep. School Dist.*, 996 F.2d 745 (5th Cir. 1993).

18 *Gares v. Willingboro Township.*, 90 F.3d 720 (3d Cir. 1996).

19 *Roma Constr. Co. v. aRusso*, 96 F.3d 566 (1st Cir. 1996).

aspects of the Bill of Rights — except the 5th Amendment's Just Compensation Clause.

2. Doctrines of claim and issue preclusion have been misemployed by lower courts to undercut *Williamson County*'s "ripening" process.

The mechanism for keeping property owners out of federal court has been the combination of *Williamson County*'s requirement of state court litigation with *res judicata* and collateral estoppel. The law is used as a diabolical trap. Once a property owner sues in state court, any attempt to follow *Williamson County*'s directive to *then* litigate the "ripened" 5th Amendment case in federal court is met by one or more of the preclusion doctrines and the case is summarily dismissed.

Federal cases dismissing property owners' "ripened" efforts at federal court litigation abound. (E.g., *Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998]; *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-729 [3d Cir. 1989]; *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 364-365 [9th Cir. 1993]; *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319 [10th Cir. 1998]; *Rainey Brothers Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998, 1002 (W.D. Tenn. 1997], *aff'd* 178 F.3d 1295 [6th Cir. 1999][table][unpublished Sixth Circuit opinion at 1999 U.S. App. LEXIS 6396].)

Thus, according to these cases, "the very act of 'ripening' a case also ends it." (Robert H. Freilich, *The Public Interest Is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371, 387 [1999].) In Prof. Roberts' colorful words:

> "Ironically, an unripe suit is barred at the moment it comes into existence. L ike a tomato that s uffers vine

rot, it goes from being green to mushy red overnight. It is never able to be eaten." (Thomas E. Roberts, *supra*, 11 J. Land Use & Envtl. L. at 72.)

As seems evident from the language of *Williamson County* and its underlying theory of "ripening" matters for federal court litigation, this Court intended no such thing. Rather, it granted property owners an opportunity to litigate their 5th Amendment cases in federal court. It is therefore apparent that the lower courts are undermining this Court's intent.[20] Plainly, the preclusion doctrines being used to bar federal court litigation were known to this Court when it decided *Williamson County*. Just as plainly, *Williamson County* established a system that permitted dual court litigation: first in state court, to exhaust the state compensation remedy and thereby "ripen" the case, followed by an action in federal court, to litigate the merits of the underlying 5th Amendment claims. If the lower courts are correct, then the *Williamson County* "ripening" procedure was stillborn, and this Court wasted its time in formulating it. As the 10th Circuit put it, "It is difficult to reconcile the ripeness requirements of *Williamson* with the laws of res judicata and collateral estoppel." (*Wilkinson*, 146 F.3d at 1325, fn. 4.) It is time for this Court to review the way in which its *Williamson County* decision has been treated by the lower courts. Either the requirement of state court litigation should be eliminated, or it should have no preclusive impact on subsequent federal court litigation.

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[20] This Court made it crystal clear in *England*, 375 U.S. at 416-417 that limiting a litigant to certiorari review from a State supreme court was not an acceptable substitute for full federal court litigation. (Compare App., p. 7, where the court below disagreed.) Besides, state courts often dispose of these cases on the basis of state law, so that seeking certiorari may not even be possible.

C. With Respect, There Is A Flaw At The Core Of *Williamson County* That Explains The Lower Court Confusion: Its Assumption That A 5th Amendment Taking Without Just Compensation Is Not Complete Until A State Court Certifies That The Local Agency Really Won't Pay.

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights to be incorporated into the 14th Amendment's Due Process Clause)[21] prohibits government from taking private property for public use unless it pays just compensation. Logically, a violation of that provision occurs as soon as government actions take private property and the municipality refuses to pay. There is nothing in either logic or the 5th Amendment to require that refusal to be certified by a state court before it is complete.

Therein lies *Williamson County*'s flaw. The opinion quite properly begins its analysis with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blends or blurs the distinction between acts of the agency that has actually committed the taking and the State that may or may not have provided a litigational process for seeking compensation. (473 U.S. at 195-196.)

But the *State* is not involved in 42 U.S.C. § 1983 cases like this one. States and their officials cannot be sued under section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 123 S.Ct. 1972

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21 *Chicago B.&Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

[2003]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue is whether the local entity — like the City of Rochester at bench — is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the city can be *compelled* to pay lies at the heart of both state and federal court litigation. Thus, the aggrieved property owners' adversaries ask: how can the plaintiff get a "second bite of the apple" by simply re-filing for the same relief on the same facts in the other court system?

The answer lies in the fact that, under *Williamson County*, the aggrieved property owners have no choice whatever — they *must* sue first in state court, even though they desire only one "bite" — and they want that one in the federal courts, the historical guardians of the federal Constitution — the same as other plaintiffs complaining of federal law violations.

The crux of the problem is *blurring the State legal system with the local agency defendant* and disregarding the plain words of the Constitution. Nothing in the 5th Amendment requires that. It does not say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court.*"

The issue is not whether a state has countenanced the constitutional violation; the suit is not against the state. Rather, the issue is whether the particular defendant has committed it. 42 U.S.C. § 1983 forbids any person acting under color of state law from violating rights secured by federal law. When a city council — like Rochester's — prohibits viable economic use of property without any pretext of compensation, it has violated Section 1983. The presence or absence of a state remedy has no bearing on whether the malefactor has done the deed.

Nor are other constitutional rights treated that

way.[22] Just as the Constitution forbids taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law. The constitutional provision is the same 14th Amendment stricture: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant. (See *Monroe v. Pape*, 365 U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; *Felder v. Casey*, 487 U.S. 131, 148 [1988] [section 1983 suits are enforceable in federal court "*in the first instance*"] [emphasis added]; cf. *Screws v. United States*, 325 U.S. 91, 108 [1945].)

If, as *Williamson County* said, the federal violation is not ripe until a *state court* verifies that state law provides no remedy, then all Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by

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22 *Williamson County*'s analogy to the Tucker Act's provisions for suing the United States for a taking (473 U.S. at 194), while superficially plausible, seems inapt. All that the Tucker Act cases say is that, before a property owner can sue to *invalidate* a federal law as a taking, the owner must first sue in a *federal* court for compensation under the *federal* Constitution. That is all Mr. Kottschade and others want: the ability to sue the offending municipality immediately in a *federal* court for compensation for violating the *federal* Constitution.

federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the Constitution." (Eagle, *supra* at 1070.)[23]

There is no need to sue in state court merely to confirm the non-payment. The non-payment is obvious; it is the reason for the suit. This can be seen in any regulatory taking case. In *City of Monterey*, 526 U.S. 687, for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit and one trip to this Court. That process did not end for another 13 years. At no time — even after a compensatory judgment had been entered after trial — did the city offer to pay anything. Suit was not necessary to determine the lack of compensation.

Nor is a state court suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. Here, for example, Mr. Kottschade directly told the city that its actions had taken his property and demanded that the city begin proceedings to condemn the land and compensate him. The city denied it. Must he now impose on the time of a state court seeking to have it say the obvious? To what end?

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23 See also Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Bank*, in *Taking Sides on Takings Issues: Public and Private Perspectives*, (A.B.A. 2002; Thomas E. Roberts ed.) (contrasting the treatment of land use cases with police brutality and parade permit cases).

There is no need to require the victim to approach a third party (the state courts) in order to establish that she has a federal claim at all. That is a job for the federal courts. Worse, deferring to state courts is tantamount to granting state courts a veto over citizens' access to federal court, making them *de facto* federal court gatekeepers. On the contrary, this Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)

D. Commentators Have Vied With Each Other Devising Ways To Disparage The Quagmire The Lower Courts Have Created In Their Applications Of *Williamson County*.

Even before *City of Chicago*, lower court applications of *Williamson County* were described by courts and commentators as "odd,"[24] "unpleasant,"[25] "unfortunate,"[26] "ironic,"[27] "unclear and inexact,"[28]

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24 *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299, 1307, fn. 8 (11th Cir. 1992).

25 Roberts, *supra*, 24 Urb. Law. at 480.

26 *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299, 1306, fn. 5 (11th Cir. 1992); Jan Laitos, *Law of Property Rights Protection* § 10.05[A][5], p. 10-25 (Aspen Publishers 1999).

27 Kathryn E. Kovacs, *supra*, 26 Ecology L.Q. at 20.

28 Robert Meltz, Dwight H. Merriam & Richard M. Frank, *The Takings Issue* 67 (Island Press 1999).

"surprising,"[29] "worse than mere chaos,"[30] "dramatic,"[31] "misleading,"[32] an "anomaly,"[33] "paradoxical,"[34] "most confusing,"[35] a "source of intense confusion,"[36] "inherently nonsensical,"[37] "shocking,"[38] "absurd,"[39] "self-stultifying,"[40] "revolutionary,"[41] "nonsense,"[42] "draconian,"[43] "riddled with obfuscation and inconsistency,"[44] and thereby creating "a procedural

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29 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 67.

30 Freilich, *supra*, 31 Urb. Law. at 387.

31 Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation,* 20 Zoning & Plan. L. Rep. 17 (1997).

32 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71.

33 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 479; Roberts, *supra*, 11 J. Land Use & Envtl. L. at 68.

34 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71; Stein, *supra*, 48 Vand. L. Rev. at 93.

35 Laitos, *supra*, p. 10-20.

36 Freilich, *supra*, 31 Urb. Law. at 387.

37 Freilich, *supra*, 31 Urb. Law. at 387.

38 Overstreet, *supra*, 20 Zoning & Plan. L. Rep. at 27.

39 Overstreet, *supra*, 20 Zoning & Plan. L. Rep. at 27.

40 Freilich, *supra*, 31 Urb. Law. at 387.

41 *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995); see Kovacs, *supra*, 26 Ecology L.Q. at 20.

42 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 480.

43 *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995); see Kovacs, *supra*, 26 Ecology L.Q. at 20.

44 Testimony of Prof. Daniel R. Mandelker before the House Judiciary Committee, reproduced at 31 Urb. Law. 234, 236 (1999).

morass,"[45] "conflict of decision,"[46] a "result [that] makes no sense,"[47] "doctrinal confusion,"[48] a "mess,"[49] a "trap,"[50] a "quagmire,"[51] a "Kafkaesque maze,"[52] and "a fraud or hoax on landowners."[53]

It is worth noting that many of these commentators are avowedly government-oriented in their views, yet they agree with landowners' criticisms and they clearly are troubled by the chaotic and unjust nature of the rule in question.

Enough time has passed and enough experience has been had in lower courts for this Court to examine the operation of the *Williamson County* rule and re-evaluate its conclusion that *de facto* denies land owners any opportunity whatever to try their *federal* constitutional claims in *federal*

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45 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 482.

46 Freilich, *supra*, 31 Urb. Law. at 388; Meacham, *supra*, 32 Urb. Law. at 240 ("The circuits have been divided on whether there is a way to avoid the Williamson trap, and the Supreme Court has sent conflicting messages.")

47 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 478.

48 Freilich, *supra*, 31 Urb. Law. at 388.

49 Delaney & Desiderio, *supra*, 31 Urb. Law. 195.

50 David A. Dana & Thomas W. Merrill, *Property Takings* 264 (2002); Freilich, Wyker & Harris, *supra*, 31 Urb. Law. at 716; Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, *Federal Land Use Law* § 4A.02[6] at p. 4A-21 (Clark, Boardman, Callaghan 1998); Meacham, *supra*, 32 Urb. Law. 239; Meltz, Merriam, & Frank, *supra* at 67.

51 Kassouni, *supra*, 29 Cal. West. L. Rev. at 44.

52 Kassouni, *supra*, 29 Cal. West. L. Rev. at 51.

53 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71.

courts. As Professor Mandelker put it:

> "In my opinion, federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits." (Mandelker, *supra*, 31 Urb. Law. at 236.)

Only this Court can end that distortion and bring some rationality to the jurisdictional aspects of regulatory takings law.

IV. AS A DIRECT RESULT OF LOWER COURT MISUSE OF *WILLIAMSON COUNTY*, AND NOW THEIR DISREGARD OF *CITY OF CHICAGO*, PROPERTY OWNERS IN 5TH AMENDMENT TAKING CASES HAVE NOT ONLY BEEN DENIED ACCESS TO FEDERAL COURTS TO PURSUE FEDERAL REMEDIES UNDER 42 U.S.C. § 1983, BUT ALSO DENIED THE 7TH AMENDMENT RIGHT TO A JURY GUARANTEED BY THIS COURT'S *CITY OF MONTEREY* DECISION.

Lower court actions barring property owners from federal court (except, when defendants invoke *City of Chicago* and remove state court litigation) have serious consequences: they deny aggrieved parties the ability to invoke civil rights jurisdiction under 42 U.S.C. § 1983 to have federal courts guard against local government incursions into constitutionally protected realms, and they deny property owners the 7th Amendment right to a jury trial that is provided in federal court, but generally denied in state courts in land use cases, in deciding governmental liability under section 1983. (*City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 719 [1999].)

A. The *Williamson County* Rule, As Applied By The Lower Courts, Denies Property Owners The Protection Intended By 42 U.S.C. § 1983.

A Section 1983 case is a "species of tort liability,"[54] a statutorily created "constitutional tort"[55] that sweeps within its ambit all governmental actions that impair Bill of Rights protections. Section 1983 was intended to provide "a uniquely *federal* remedy"[56] with "broad and sweeping protection"[57] "to secure private rights against government encroachment"[58] "read against the background of tort liability that makes a man responsible for the natural consequences of his actions"[59] so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged.[60] While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader" than tort law,[61] and must be broadly and liberally

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54 *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994).

55 *Jefferson v. City of Tarrant*, 522 U.S. 75, 78-79 (1997); *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978).

56 *Mitchum v. Foster*, 407 U.S. 225, 239 (1972); emphasis added.

57 *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) [quoting with approval].

58 *Inyo County v. Paiute-Shoshone Indians*, 123 S.Ct. 1887, 1894 (2003).

59 *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in part, to expand government liability, in *Monell*, 436 U.S. 658.

60 *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

61 *Kalina v. Fletcher*, 522 U.S. 118, 124-125 (1997).

construed to achieve its goals.[62] Its "goals" are straightforward: **"to provide compensatory relief to those deprived of their *federal* rights by state actors"**[63] **by "interpos[ing] the *federal courts* between the States and the people, as guardians of *the people's federal rights.*"**[64] To effectuate those goals, Congress intended to "throw open the doors of the United States courts" to those who had been deprived of constitutional rights "and to provide these individuals *immediate access to the federal courts* . . . ."[65]

But in cases like the one at bench, property owners find this Court's holdings obverted. Instead of interposing the federal courts as the citizen's protector against local government, the system interposes state law as a barrier between the citizen and the federal courts.

Contrary to this Court's section 1983 holdings, property owners — and they alone — find the doors of the United States courts not merely hard to open, but barred. (See Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 477; Brian Blaesser, *Closing The Federal Courthouse Door On Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Property L.J. 73 [1988].)

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62 *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

63 *Felder v. Casey*, 487 U.S. 131, 141 (1988); emphasis added.

64 *Mitchum*, 407 U.S. at 243; emphasis added.

65 *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 (1982); emphasis added.

B. The Lower Courts' Application Of *Williamson County* Denies Property Owners Their 7th Amendment Right To A Jury Trial Under *City Of Monterey*.

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) made another major post-*Williamson County* change in regulatory taking law.

In *City of Monterey*, this Court held as a matter of first impression that plaintiffs in section 1983 litigation — specifically, property owners like the ones involved there and here — have a 7th Amendment right to a jury trial on the issue of liability. That, as this Court recognized in *City of Monterey*, 526 U.S. at 719, is in stark contrast to the practice in state courts generally, which don't submit regulatory taking liability issues to juries.[66] But the trial court in *City of Monterey* did, and this Court affirmed.

Others have recognized the potentially significant change this means for regulatory taking litigation. (E.g., Meacham, *supra*, 32 Urb. Law. at 240, 242-243.)

By denying Mr. Kottschade federal court access, the courts below denied his 7th Amendment right to obtain a jury determination of the city's liability. This Court could not have considered that issue when it decided *Williamson County* 17 years earlier. It merits consideration now.

CONCLUSION

American property owners have become the proverbial pea in a jurisdictional shell game. Unlike all other victims of federal constitutional violations, their

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66 For a recent example of such refusal, see *Cumberland Farms v. Town of Groton*, 808 A.2d 1107 (Conn. 2002).

attempts to seek justice in federal court are rebuffed. They are told to sue in state court. When they do so, their adversaries can unilaterally remove the cases to federal court. Once removed, the plaintiffs find their removed cases dismissed (on motion of the removing defendants!) and are told to litigate in state court — where they filed in the first place. With the utmost respect, that isn't law; it is a parody usually found only in the legal humor sections of libraries. (See, e.g., Arthur Train, *Mr. Tutt Plays It Both Ways*, in *Mr. Tutt's Case Book* 413 [Charles Scribner's Sons 1948].) In the process, lower federal courts have abandoned their traditional roles as guardians of the constitutional rights of American citizens, leaving them to wander through a procedural maze that has no federal exit.

Petitioner prays that certiorari be granted so that this "anomalous . . . gap in Supreme Court jurisprudence," as the court below gently called it, can be rectified.

Respectfully submitted,

George O. Ludcke
KELLY & BERENS
3720 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6171

Duane J. Desiderio
NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, NW
Washington, D.C. 20005
(202) 266-8146

Michael M. Berger*
Gideon Kanner
BERGER & NORTON
**Counsel of Record*
12121 Wilshire Blvd.
Suite 1300
Los Angeles, CA 90025
(310) 979-2500

APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 02-1504MN

Franklin P. Kottschade, Appellant	*	
v.	*	
City of Rochester, Appellee	*	
Am. Forest & Paper Ass'n; Bldg. Indus. Legal Defense Fund of Southern Cal.; Cal. Bldg. Indus. Ass'n; Int'l Council of Shopping Centers; Nat'l Ass'n of Indus. & Office Properties; Nat'l Ass'n of Real Estate Investment Trusts; National Ass'n of Real Estate Investment Trusts; Nat'l Ass'n of Realtors; Real Estate Roundtable; and Rochester (Minnesota) Area Builders, Amici on Behalf of Appellant League of Minnesota Cities; Nat'l League of Cities; and Int'l Municipal Lawyers Association, Amici on Behalf of Appellee.	*	On Appeal from the United States District Court for the District of Minnesota.

App. 2

Submitted: October 10, 2002
Filed: February 13, 2003

Before RILEY, RICHARD S. ARNOLD, and SMITH, Circuit Judges.

RICHARD S. ARNOLD, Circuit Judge.

Franklin P. Kottschade, a developer, brought this claim under 42 U.S.C. § 1983 against the City of Rochester, charging that the City had taken his property for public use without just compensation, in violation of the Fifth Amendment. He now appeals from a District Court[1] dismissal for failure to state a claim upon which relief can be granted. Because Mr. Kottschade has not exhausted his state court remedies, as required by current takings jurisprudence, we affirm the District Court's dismissal of his complaint.

In the mid-1990's Mr. Kottschade sought a conditional use permit from the City of Rochester to build a townhouse project on a 16.4 acre parcel of property which he had acquired in 1992. In June of 2000, the City granted him a permit for a townhouse project on part of his property, subject however to nine specific conditions. These conditions included requirements that provisions be made for increased vehicular and pedestrian traffic, storm water management, and dedicated parkland. Mr. Kottschade alleges that the nine conditions, taken together, which were placed on his proposal to build townhouses on the land, were out of proportion to the impact this development of the property would have had on the City of Rochester, and that they rendered the project an

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[1] The Hon. Ann D. Montgomery, United States District Judge for the District of Minnesota.

economic impossibility, thus in effect taking his property without just compensation.

Mr. Kottschade unsuccessfully appealed both to the city's zoning Board of Appeal and to the city's Common Council to eliminate all of the conditions. He then filed this action challenging the constitutionality of the conditions attached to the permit, and requesting just compensation under the Fifth Amendment. The City of Rochester moved to dismiss, arguing that, under Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), Mr. Kottschade could not bring a constitutional takings claim in federal court before obtaining a final decision from the city, and that the suit was wrongly brought in federal court in the first instance since it was not yet ripe, given that state court procedures remained available to the plaintiff.

The District Court dismissed the action, concluding that until Mr. Kottschade sought relief in a state-court inverse-condemnation action and had relief denied, the claim of taking without just compensation was not ripe for decision in a federal court. In this appeal Mr. Kottschade argues that the Supreme Court decisions in Williamson and City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997), when read together, permit him to bring a claim for relief under the Fifth Amendment Just Compensation Clause in federal court in these circumstances.

I.

We review a District Court's grant of dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim de novo. All facts alleged in the complaint are taken as true and construed in the light most favorable to the plaintiff. Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994). A motion to dismiss should not be granted unless the plaintiff can prove no set of facts entitling him to relief. Such is the case here,

and so we affirm the District Court's dismissal of the claim. Until Mr. Kottschade has exhausted his state court remedies, his claim may not be brought in federal court.

Mr. Kottschade's constitutional claim is brought under the Just Compensation Clause of the Fifth Amendment, which provides, "[N]or shall private property be taken for public use, without just compensation." Mr. Kottschade argues that dismissal of his claim by the District Court was improper because, despite the Supreme Court's holding in Williamson, the 1997 City of Chicago decision modifies the earlier case in such a way as to permit him to seek a remedy initially in federal court. He asks us to reconcile these two Supreme Court holdings. The plaintiff requests that this Court acknowledge that City of Chicago has modified the requirements laid out in Williamson with respect to procedures plaintiffs must follow in seeking just compensation for takings of property. Under Williamson, a property owner "has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." 473 U.S. at 195. City of Chicago is said to have modified this holding by permitting plaintiffs in takings cases to file claims in federal court first as a matter of course. We have held that these procedures include the filing and prosecution of an action for inverse condemnation in the state courts. McKenzie v. City of White Hall, 112 F.3d 313, 317 (8th Cir. 1997); Collier v. City of Springdale, 733 F.2d 1311, 1317 (8th Cir. 1984).

What the plaintiff actually asks is that this Court find that the Supreme Court's decision in City of Chicago overrules Williamson in part, specifically its holding that "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure

and been denied just compensation." 473 U.S. at 195. But as the District Court noted, City of Chicago's holding addresses only the question of federal-question jurisdiction over a ripe takings claim. It does not explicitly answer the question of what is necessary to render a takings claim ripe. The Supreme Court has not explicitly overruled or modified the ripeness requirements laid out in Williamson in the context of takings cases. The requirement that all state remedies be exhausted, and the barriers to federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, may be anomalous. Nonetheless Williamson controls the instant case. Compare this perceived gap in Supreme Court jurisprudence with this Court's observations in Commonwealth of Puerto Rico v. Branstad, 787 F.2d 423 (8th Cir. 1986). There this Court declined to declare that a Civil War case, Com. of Kentucky v. Dennison, 24 How. 66 (1861), had been implicitly overruled, while registering its view that the holding of the case had been substantially eroded. Within a year the Supreme Court had overruled Dennison. Puerto Rico v. Branstad, 483 U.S. 219 (1987). Whether something similar should occur here is for the Supreme Court to say, not us.

The Supreme Court in Williamson defined the exhaustion requirement to include judicial as well as administrative remedies: "the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." 473 U.S. at 193. Unlike the appellee in Williamson, who had not sought variances from a planning commission's imposition of requirements for development, Mr. Kottschade has already sought variances, which have been denied. However, he has not yet pursued a postdeprivation remedy in state court, as is required by Williamson and subsequent jurisprudence.

The plaintiff points out, and justly so, that if he is required to seek a postdeprivation remedy in a state-court inverse-condemnation action, he may end up being altogether denied a federal forum for what is undoubtedly a federal right. Such a federal forum, he urges, is guaranteed by 42 U.S.C. § 1983 and its jurisdictional counterpart, and a plaintiff has a right to bring a § 1983 claim in a federal trial court, at his option. If plaintiff must go to the state courts, he would presumably need to show, in order to prevail in an inverse-condemnation action, that a taking had occurred, and that just compensation had not been paid. If the state courts hold for the plaintiff, then all is well, from his point of view, and there would be no need for recourse to a federal forum. But if they hold against him, for example, on the ground that no taking has occurred, doctrines of former adjudication may be a bar to a new action under § 1983 in a federal trial court. The difficulty is not unlike that which arises when a federal court decides to abstain from the exercise of jurisdiction, remitting the plaintiff, in the first instance, to his state remedies. See Note, Consequences of Abstention by a Federal Court, 73 Harv. L. Rev. 1358, 1365-68 (1960). In the abstention context, the Supreme Court has held that a plaintiff required to resort first to the state courts may reserve his federal claims, submitting to the state courts only claims arising under state law. In this way, if the plaintiff loses in the state courts, his way to the federal forum will not be barred by doctrines of former adjudication. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). Plaintiff suggests that a similar framework would be at least a partial solution to his problem. If he must go to the state courts first, he says, we should hold now that whatever those courts do adverse to the plaintiff will not bar him from later filing a federal case on his Takings Clause claim.

The suggestion has the virtue of logic and is tempting, but we think the part of prudence is to decline it at this stage of the case. We do not know what the result of any state-court

action may be. Perhaps plaintiff will win in the state courts. Perhaps he will lose there, but then obtain Supreme Court review on the merits, a review that would at least afford him an appellate federal forum and would be unquestionably conclusive on the lower federal courts. Plaintiff may seek to reserve his federal claims when he files his state-court complaint, and the state courts, by analogy to England, might honor this reservation. Other possibilities suggest themselves. The point is this: it is simply too early to say now exactly what res judicata or collateral-estoppel argument might be appropriate in the future, and exactly what the answers to any such argument might be. We understand that deferring a decision on this point is frustrating to the plaintiff, but the federal courts do not sit to decide questions in the abstract. If the plaintiff goes to the state courts and loses, and then files a 42 U.S.C. § 1983 action in a federal court, that court, subject to appropriate appellate review, will be in a much better position to determine the effect of the prior state-court adjudication.

The judgment of the District Court, dismissing the complaint for failure to state a claim on the ground that the case is not yet ripe under the Williamson line of authority, is affirmed. This action is without prejudice to the right of the plaintiff, if he files a state-court case and loses, to file a new action in a federal court and make whatever arguments he wishes with respect to the effect of the prior state-court adjudication.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1504

Franklin P. Kottschade,	*	
Appellant,	*	
vs.	*	Order Denying Petition for Rehearing and for Rehearing En Banc
City of Rochester,	*	
Appellee	*	
American Forest and Paper Association, et al.	*	
Amici on Behalf of Appellant,	*	
League of Minnesota Cities; National League of Cities; and International Municipal Lawyers Association,	*	
Amici on Behalf of Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

March 21, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Franklin P. Kottschade

Plaintiff,

v.

The City of Rochester,

Defendant.

MEMORANDUM OPINION AND ORDER

Civil No. 01-898 ADM/AJB

George O. Ludcke, Esq., Kelly & Berens, P.A., Minneapolis, MN, appeared on behalf of Plaintiff.

Clifford M. Greene, Esq., and Pamela VanderWiel, Esq., Greene Espel, P.L.L.P, Minneapolis, MN, appeared for and on behalf of Defendant.

I. INTRODUCTION

On November 21, 2001, the Motion on Dismiss and for Summary Judgment [Doc. No. 7] of Defendant City of Rochester ("Defendant") was argued before the undersigned United States District Judge. The City moves for dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted. For the reasons set forth below, the Motion to Dismiss [Doc. No. 7] is granted.

II. BACKGROUND

A complete recitation of the facts in this case would be long and complicated.[1] Boiled down to the occurrences

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[1] The fact statement alone spans 16 pages of Plaintiff's Response Brief.

bearing upon this motion, the relevant background is as follows.

In February, 2000, Plaintiff Franklin P. Kottschade ("Plaintiff") sought a conditional use permit from Defendant to build a townhouse project on his property. Defendant panted Plaintiff's application to rezone his property to accommodate the development, and approved Plaintiff's General Development Plan. Amended Complaint at ¶¶9,19. However, this approval was subject to nine specified conditions, Id. Plaintiff alleges the conditions impose burdens which render the project economically unfeasible. Pl. Resp. at 2. Plaintiff's compromise attempts to eliminate the conditions have been rejected, and he was unsuccessful in pursuing "various administrative procedures" to eliminate the conditions. Id. Plaintiff applied for a variance, seeking a waiver from compliance with all nine conditions. Complaint at ¶20. Plaintiffs petition for a variance was denied by both the Defendant at the zoning board and council levels. Id. at ¶¶22-23. Defendant asserts that each of the nine conditions reflect an application of preexisting ordinances and regulations applicable to all development projects. Def. Mem. in Supp. at 3; Adkins Aff., Ex. B. Plaintiff challenges the constitutionality of the conditions attached to the permit granted by Defendant. Plaintiff has styled his cause of action as a federal takings claim under 42 U.S.C.§1983, rather than a state court inverse condemnation claim.

III. DISCUSSION

The Federal Rules of Civil Procedure provide that a party may move to dismiss claims for lack of jurisdiction over the subject matter under Fed. R. Civ. P.12(b)(1), and for failure to state a claim upon which relief can he granted under Fed. R. Civ. P.12(b)(6). In considering a motion: to dismiss, the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the Complaint must be taken as true. Hamm v.

Groose, 15 F.3d 110,112 (8th Cir. 1994); Ossman v. Diana Corp., 825 F.Supp. 870, 879-80(D. Minn. 1993). Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the non-moving party. Ossman, 825 F.Supp. at 880.

The parties agree that the threshold issue in this case is whether Plaintiff can bring a constitutional takings claim in federal court in federal court in the first instance, or whether Plaintiff must first seek compensation through state procedures. Defendant argues that Williamson county Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), prevents Plaintiff from bringing his takings claim in federal court without first exhausting the state law mechanisms available for seeking just compensation. Defendant relies on the Supreme Court's holding that "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" Williamson, 473 U.S. at 195 (quoting Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984)).

Plaintiff responds that City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997), overrules Williamson and allows a takings claim to be brought directly in a federal venue. Plaintiff relies on the conclusion in College of Surgeons that "the District Court properly exercises federal question jurisdiction over the federal claims in [Respondent's] complaints . . . " College of Surgeons, 522 U.S. at 166. Plaintiff reasons that because (1) claims can only be removed to federal court under 28 U.S.C. § 1441(a) if the district court has original jurisdiction, and (2) the claims removed in College of Surgeons were Due Process, Equal Protection, and takings claims, therefore it necessarily follows that (3) the district courts of the United States must have original jurisdiction over takings claims. Pl. Resp. at 22.

As both parties candidly concede, the dispositive

determination in this case is whether or not College of Surgeons overrules the Williamson precedent. It does not.

A. Williamson

In Williamson, the Court granted certiorari to address the question whether federal, state, and local governments must pay money damages to a landowner whose property allegedly has been temporarily "taken" by the application of government regulations, Williamson, 473 U.S. at 185. The Court did not reach that question, however, finding instead that the takings claim, *inter alia*[2] was premature because respondent had not utilized state procedures provided for obtaining just compensation. Id at 186.

Because the Fifth Amendment does not proscribe takings, *without just compensation*, no constitutional violation occurs until just compensation has been denied, Id. at 145 n.13. "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." Id. Therefore, a property owner simply has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation. Id. at 195.

In discussing the procedure for bringing a takings claim, the Court stated that "[*i*]f the government has provided an adequate process for obtaining compensation, and if **resort** to that process 'yield[s] just compensation,' then the property owner 'has

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[2] The Williamson Court also held that Respondent had not obtained a final decision regarding the application of the challenged zoning ordinance and subdivision regulations. Id. at 187. Both the absence of a final decision and the failure to exhaust state procedures were independent reasons why Respondent's claim was not ripe. Id. at 187, 194, 200.

no claim against the Government' for a taking." Id. at 194-195 (quoting Ruckelshaus v. Monsanto Co., 467 U.S., 986, 1013, 1018 n.21 (1984)). Under this exhaustion requirement, takings claims are premature until the property owner has availed itself of the state process provided for seeking redress.[3] See Id. at 195.

The State of Minnesota provides a process by which plaintiffs may be compensated for any takings of property. Pursuant to the Minnesota Constitution, Article I, section 13, private property may not be taken, destroyed or damaged for a public purpose without just compensation. To enforce this provision, a plaintiff may bring an inverse condemnation action by petition for writ of mandamus. Wilson v. Ramscher, 352 N.W. 2d 389, 394 (Minn. 1984). Plaintiff has not shown that the existing state procedures are either unavailable or inadequate, and until he has utilized those procedures, a federal takings claim is not ripe for adjudication. See id. at 197.

B. College of Surgeons

Plaintiff contends that College of Surgeons overrules the Williamson exhaustion requirement. In College of Surgeons, the Supreme Court was asked to consider whether a lawsuit filed in state court seeking judicial review of decisions of a state agency, the Chicago Landmarks Commission, may be removed to federal district court, where the case contains both federal constitutional and state administrative challenges. College of Surgeons, 522 U.S. at 169. While the claims in College of Surgeons were raised through a cause of action created by state law, the state court complaint raised a number of issues of federal law in the form of various federal

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[3] Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Id. at 195.

constitutional challenges.[4] Id. at 164. The case was removed on the basis of federal question jurisdiction, and the District Court exercised supplemental jurisdiction over the state law claims to grant summary judgment in favor of the Defendant. On review, the Seventh Circuit concluded that the District Court was without jurisdiction, holding that deferential review of state agency action was an appellate function not consistent with the character of a court of original jurisdiction. Id. at 161-162. The Seventh Circuit elaborated that the "facial constitutional challenges [were] independent of the record and so would be removable to federal court if brought alone." Id. at 162. The crux of the court's decision was that, because some of the supplemental state law claims involved deferential review, the removed case as a whole could not be termed a "civil action" of which the district courts have original jurisdiction under 28 U.S.C.§1441. Id.

The Supreme Court granted certiorari to address "whether a case containing claims that local administrative action violates federal law, but also containing state law claims for on-the-record review of the administrative findings, is within the jurisdiction of the federal district courts." Id. at 163. In analyzing this questions, Justice O'Connor, writing for the Court, concluded that the federal constitutional challenges raised in the state court complaint established federal question jurisdiction under 28 U.S.C.§1331 because a " 'right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action.'" Id. at 163-164 (quoting Gully v. First Nat.

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[4] The multiple federal constitutional claims in College of Surgeons included claims that the challenged ordinances, both on their face and as applied, violated the Due Process and Equal Protection Clauses and effected a taking of property without just compensation under the Fifth and Fourteenth Amendments, and the manner in which the state agency conducted its administrative proceedings violated Respondent's rights to due process and equal protection. Id. at 160.

Bank in Meridian, 299 U.S. 109, 112 (1936)). The holding emphasizes that a cause of action created under state law might still "arise under" the laws of the United States if the right to relief under state law requires resolution of a substantial question of federal law. Id. at 164. The Court concluded that "the District Court properly exercised federal question jurisdiction over the federal claims in [Respondent's complaint] . . . " Id. at 165. Important to the instant case, the tenor of the College of Surgeons decision is that a ripe takings claim, coupled with multiple other constitutional claims, is properly the basis for removal on federal question jurisdiction. The decision does not speak to the underlying qualifications for ripeness of such a claim.

The Court then proceeded to address the precise issue on which it had granted certiorari. To that end, the Court clarified the propriety of exercising supplemental jurisdiction in particular instances. Specifically, the Court held that because the accompanying state law claims in College of Surgeons formed part of the "same case or controversy" as the federal claims under 28 U.S.C.§1367(a), the exercise of supplemental jurisdiction over those claims was proper. Id. at 165-166. The Court explained that the District Court's original jurisdiction derived from the federal claims, not the state law claims, and thus the action was properly a "civil action" within the original jurisdiction of the district courts for purposes of removal. Id. at 166.

College of Surgeons does not discuss, elucidate or alter the established standards for determining federal question jurisdiction. The Court simply "explained" that "the facial and as-applied federal constitutional claims raised by [Respondent] 'arise under' federal law for purposes of federal question jurisdiction." Id. at 167-168. The Court never specified which of the various federal claims was sufficient for jurisdiction, but merely noted that they were, *in sum* sufficient to establish federal question jurisdiction for removal

purposes. No language in the College of Surgeons case operates to alter prior law regarding federal question jurisdiction in federal courts, or the exhaustion requirement for takings claims. The Court's conclusion in College of Surgeons is directly responsive to the question on which the Court granted certiorari: "[t]he District Court properly recognized that it could exercise supplemental jurisdiction over [Respondent's] state law claims, including the claims for on-the-record administrative review of [state agency] decisions."[5] Id. at 174.

College of Surgeons addresses the issue of supplemental jurisdiction; it is not a case purporting to overturn the Williams exhaustion requirement for the ripeness of a constitutional takings claim. In discussing the significance of College of Surgeons, the Fourth Circuit noted that: "[College of Surgeons] *merely holds* that district courts can exercise supplemental jurisdiction over state claims that call for deferential on-the-record review of state administrative findings when the district court already possesses original jurisdiction over another claim." Kirkpatrick v. Lenoir County Bd. Of Educ., 216 F.3d 380, 387 n.6 (4th Cir. 2000) (emphasis added). As a matter of law, College of Surgeons simply does not overrule Williams. Therefore, the exhaustion requirement for ripeness of a constitutional takings claims is unaffected and remains good

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[5] In dissent, Justice Ginsburg reiterated the nature and scope of the Court's ruling by characterizing Justice O'Connor's opinion as an "authorization of cross-system appeals" for "on-the-record review of state and local agency actions." Id. at 175-176. That the function of the College of Surgeons case was to clarify the law of supplemental jurisdiction, not to alter the law of federal question jurisdiction, is further supported by Justice Ginsberg's description of the majority's opinion: "all this Court is willing to say is that 'the District Court properly exercised federal question jurisdiction over the federal claims . . . .'" Id. at 188. "The Court's opinion expresses 'no [further] view.'" Id.

law.[6]

Therefore, until Plaintiff seeks relief in a state court inverse condemnation action and relief is denied, the claim of taking without just compensation is not ripe for decision by a federal court. Accordingly, this Court does not have jurisdiction, and no claim upon which relief can be granted has been stated. Defendant's Motion to Dismiss is granted.

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, IT IS HEREBY ORDERED that the City of Rochester's Motion to Dismiss [Doc. No. 7] is GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY,

BY THE COURT
ANN D. MONTGOMERY
UNITED STATES
DISTRICT JUDGE:

Date: January 22, 2002

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[6] The Supreme Court reaffirmed the Williamson exhaustion requirement in City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710, 714-715, 721 (1999) (no constitutional injury from a taking alone, therefore "[a] federal court . . . cannot entertain a takings claims under §1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy"). The Williamson exhaustion requirement has also been recently relied upon by the Eighth Circuit. In Carpenter Outdoor Advertising Co. v. City of Fenton, et. al., No. 00-1869 (8th Cir. June 1, 2001), the court upheld the dismissal of a claim based on the Just Compensation Clause of the Fifth Amendment where the appellant had not followed state procedures because " '[t]he general rules is that a plaintiff must seek compensation through state procedures before filing a federal takings claim." Carpenter, slip op. at 6 (citing Von Kerssenbrock-Praschma v. Saunders, 121 F.3d 373, 379 (8th Cir. 1997); Williamson, 473 U.S. at 194-195.